



February 14, 2001

Ms. Elizabeth G. Neally  
Roerig, Oliveira & Fisher, L.L.P.  
855 West Price Road; Suite 9  
Brownsville, Texas 78520-8786

OR2001-0562

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144154.

The Brownsville Independent School District (the "district"), which you represent, received a request for information relating to the grievances of two named individuals. You have released some of the requested information. You claim, however, that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.131 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted. We also have considered the comments that were submitted to you by an attorney for the individuals who are the subjects of the requested records. *See* Gov't Code § 552.304 (providing that any person may submit written comments as to why requested information should or should not be released).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 thus encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 at 3 (1996). In that decision, we also determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the

Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* In this instance, you do not inform us, and the submitted records do not reflect, that either of the individuals to whom the submitted information pertains qualifies as a teacher or administrator for the purposes of section 21.355 of the Education Code. Consequently, the submitted records that relate to evaluations of the two individuals are not confidential under that statute and therefore may not be withheld from disclosure under section 552.101.

We note, however, that the submitted records contain information that is encompassed by other statutory confidentiality provisions. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). As the release of the submitted Form I-9’s under chapter 552 of the Government Code would be “for purposes other than for enforcement” of the referenced federal statutes, the Form I-9’s, which we have marked, are excepted from disclosure under section 552.101 in conjunction with section 1324a of title 8 of the United States Code and must not be released to the requestor. Those documents may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

The submitted records also contain W-4 forms that are confidential under section 552.101 in conjunction with section 6103 of title 26 of the United States Code. Section 6103(a) of the Internal Revenue Code makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4<sup>th</sup> Cir. 1993). The district must withhold the W-4 forms that we have marked under section 552.101 in conjunction with section 6103(a) of the Internal Revenue Code.

Next, you assert that sections 552.101 and 552.102 except the submitted information from public disclosure. Section 552.102 protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The privacy that section 552.102(a) affords to a public employee’s personnel records corresponds to the protection that section 552.101 provides in conjunction with the common law right to privacy. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision No. 659 at 4-5 (1999) (summarizing types of information that are encompassed by common law privacy).

Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See generally* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983). Thus, a public employee's allocation of part of his or her salary to a voluntary investment program offered by the employer is a personal investment decision, and common law privacy excepts information about the allocation from public disclosure. *See* Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan), 523 (1989) (contents of loan files of veterans participating in Veterans Land Board programs), 373 (1983) (contents of housing rehabilitation grant application files). On the other hand, common law privacy does not except from disclosure information about a transaction that is funded in part by the state or another governmental entity. *See, e.g.,* Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities."), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to a public body about an individual and basic facts regarding a particular financial transaction between the individual and the public body). We have marked personal financial information that the district must withhold under section 552.101 in conjunction with common law privacy.

We also note that the submitted records contain information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). We have marked information that the district must withhold under section 552.117(1) *if the employee to whom that information pertains made a timely election under section 552.024*.

A social security number also may be confidential under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that any social security number in the submitted records was obtained or is maintained pursuant to such a

statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, prior to releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

We further note that section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle record, including information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The district must withhold the Texas driver's license information that we have marked under section 552.130.

You also raise section 552.114 of the Government Code, which requires the district to withhold "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is governed by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The district must withhold information under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). In this instance, you have not directed our attention to any student-identifying information in the submitted records, nor are we able to identify any such information, that must be withheld from disclosure under FERPA and sections 552.026 and 552.114 of the Government Code. *See* Gov't Code

§ 552.301(e)(2) (providing that governmental body must label submitted information to indicate which exceptions apply).<sup>1</sup>

Lastly, we address your reference to section 552.131 of the Government Code. As chapter 552 of the Government Code includes four different exceptions to disclosure designated as section 552.131, we understand you to raise the "school district informer" exception. That version of section 552.131 provides in relevant part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). As the legislature specifically limited the protection of section 552.131 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception must clearly identify to this office a specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A). You have not directed our attention to any submitted information, and we are unable to identify any such information, that comes within the purview of section 552.131. *See* Gov't Code § 552.301(e)(2).

In summary, the submitted records do not contain any information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, sections 552.026 and 552.114 of the Government Code and FERPA, or section 552.131. However, the information in question does include records that are confidential under section 552.101 in conjunction with federal statutes, as well as personal financial information that the district must withhold under section 552.101 in conjunction with common law privacy. The submitted records also contain employee information that may be excepted from disclosure under sections 552.117 and 552.024 of the

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<sup>1</sup>We note, however, that in Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995). Questions about the applicability of FERPA to information that is the subject of a request for information under the Public Information Act may be addressed to the United States Department of Education's Family Policy Compliance Office at the following address and telephone number:

Family Policy Compliance Office  
United States Department of Education  
600 Independence Avenue S.W.  
Washington, D.C. 20202-4605  
(202) 260-3887

Government Code, social security number information that may be confidential under section 552.101 in conjunction with federal law, and motor vehicle record information that the district must withhold under section 552.130. Except for the information that is excepted from disclosure under sections 552.101, 552.117, and 552.130, the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

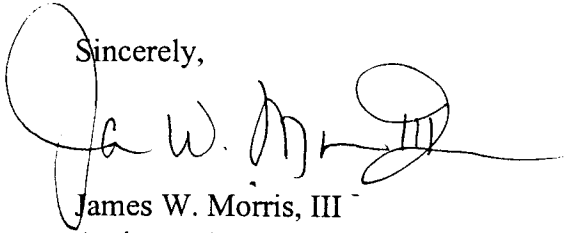
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping underline.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/er

Ref: ID# 144154

Encl: Marked documents

cc: Ms. Melrose E. Huff  
Education Reporter  
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